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IN THE

Supreme Court of the United States

October Term, 1959.

No. 225.

ORDNANCE GAUGE COMPANY, INC.,
Petitioner,

v.

JACQUARD KNITTING MACHINE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS.

Petitioner instituted this action on May 3, 1951, while other litigation between the parties was pending,[1] and respondent's answer was duly filed on June 29, 1951. Thereafter, petitioner did not order the case onto the trial list and, in fact, took no steps whatever to progress this litigation or bring it on for trial for almost five and one-half years. Finally, in November of 1956, when the clerk of court, pursuant to local court rule (R. 32a footnote 4) issued notice of impending dismissal (R. 16a), petitioner filed with the court an application that the case not be dismissed "for lack of prosecution" and attempted to order the case onto the trial list (R. 17a).[2] Before argument on petitioner's application, respondent moved for dismissal under Fed. R. Civ. Proc. 41(b) (R. 18a). Respondent's motion was supported by affidavits showing how it had been prejudiced by petitioner's delay, through death of respondent's most important witness and loss of evidence (R. 19a, 20a, 21a, 30a).

Petitioner's application and respondent's motion under Rule 41(b) were heard together and Chief Judge Kirkpatrick granted respondent's motion, with prejudice (R. 22a). On re-hearing, after petitioner had for the first time offered an affidavit with which it attempted to excuse its delay (R. 23a-25a), Judge Kirkpatrick modified his previous action by ordering that the dismissal be without prejudice (R. 29a). This put plaintiff in the same position as if it had made no application and the clerk had marked the case dismissed under the local rule of court. The Court of Appeals, in an opinion written by Chief Judge Biggs (R. 31a-40a), affirmed the trial court's exercise of its discretionary power to dismiss, reasoning that, in view of

1. *Jacquard Knitting Machine Co., Inc. v. Ordnance Gauge Co., Inc. and Julius Sirmay*, 108 F. Supp. 59 (E. D. Pa. 1952), *aff'd.*, 213 F. 2d 503 (3d Cir. 1954).

2. Under the local practice a case is not placed upon the trial calendar until counsel issues a "trial order" (R. 36a).

the provisions of Rule 41(b), the dismissal without prejudice had been properly ordered. The contention that the Court of Appeals' decision was in conflict with this Court's opinion in *Societe Internationale v. Rogers*, 357 U. S. 197 (1958), was considered and disposed of, *per curiam*, on petition for re-hearing (R. 41a-43a), but is again urged here as the petitioner's principal reason for seeking grant of certiorari.

ARGUMENT.

The trial judge's orders (R. 22a, 29a) dismissing this action because of the petitioner's failure to prosecute has been affirmed on the authority of Federal Rule of Civil Procedure 41(b), which provides:

> "*For failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move for dismissal of an action or of any claim against him* . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis added.)

Petitioner asks this Court to re-examine the dismissal, urging that Rule 41(b) does not furnish authority for dismissal under the circumstances of this case. In essence, it contends that the "failure to prosecute" comprehended by Rule 41(b) is only failure to appear and proceed when a case is called for trial. Since this case had never been called for trial, petitioner not having ordered it onto the trial list during the five and a half years it was at issue, petitioner concludes that dismissal under Rule 41(b) was improper (Petition, pp. 13, 18). Its supplemental argument is that if Rule 41(b) is applicable here it is violative of due process (Petition p. 20-23).

The issues raised by the petition are not such as warrant consideration by this Court in exercise of its certiorari jurisdiction (See Supreme Court Rule 19 (1)(b)). The decision below does not, in any way, conflict with applicable decisions of this Court or other courts of appeals. Rather, its approval of the District Court's dismissal because petitioner failed to prosecute is in accord

with long established practice and the decisions of this Court and the courts of appeals. Although the proper interpretation and application of the Federal Rules of Civil Procedure is an important matter, the questions raised by the petition for certiorari have long since been settled and do not call for a separate exercise of this Court's jurisdiction. Petitioner was granted a full and impartial hearing by the District Court. On the focal issue of whether the District Court abused its discretion in dismissing the action, the Court of Appeals correctly held that there was no basis for overturning the District Court's exercise of its discretionary power.

I. The Discretionary Power of Trial Courts to Dismiss Cases for Failure of the Plaintiff, at Any Stage, to Prosecute Its Action With Diligence Is Well Established.

Long before the advent of the Federal Rules of Civil Procedure, it was settled that courts have an inherent power, independent of any statute or court rule, to dismiss actions which the plaintiff neglects, at any stage, to prosecute with diligence: *3 Blackstone, Commentaries*, Chapter 20, *295-296 and Chapter 27, *451; *Homer v. Brown*, 16 How. 354, 365 (1853); *Johnston v. Standard Mining Co.*, 148 U. S. 360, 370 (1892); *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948). As stated in *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406, 409 (9th Cir. 1940):

> "'The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal.'"

No fixed rules can be formulated as to when it is appropriate that the power be exercised. This necessarily depends on the facts and circumstances of each case and the decision is left to the sound discretion of the trial judge. On appeal the only issue is whether or not that discretion has been abused. Thus, in *Facer Forged Steel Car Wheel & Locomotive Wheel Co. v. Carnegie Steel Co.*, 295 Fed. 134 (3d Cir. 1924), *cert. den.*, 265 U. S. 581 (1924), where the Circuit Court described the situation as follows (295 Fed. at 135):

> ". . . the plaintiff was at all times (during at least nine years) in position to bring the case to issue on five days' notice and have it set down for hearing. As the defendant did nothing to interfere with this right, it became the duty of the plaintiff to exercise it if it desired the redress it was seeking. In contemplation of law, it never ceased to be the actor. As it ceased to act it ceased to prosecute its suit . . ."

the Circuit Court concluded that, there being no abuse of discretion, the trial judge's dismissal for failure to prosecute should be affirmed even though "we might have come to a conclusion different from his" (295 Fed. at 135).

Here, on facts similar to those in *Facer*,[3] the District Court judge, who was uniquely familiar with all the facts,[4] after argument and reargument, exercised his discretion to dismiss. The Court of Appeals, after full argument and consideration of a petition for rehearing, affirmed. The careful study which this case has received in the courts below negatives any possibility that the discretion was

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3. Also see *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 94 Fed. 312 (8th Cir. 1899).

4. Not only had Chief Judge Kirkpatrick heard the argument and reargument of the matter, but he had been the trial judge in the earlier proceedings between the same parties. (See *Jacquard Knitting Machine Co., Inc. v. Ordnance Gauge Co., Inc. and Julius Sirmay*, 108 F. Supp. 59 (E. D. Pa. 1952).

exercised arbitrarily or without the fullest consideration of all the relevant factors.

II. Rule 41(b) Is Declaratory of the District Courts' Long-Established Power to Dismiss at Any Stage.

That Rule 41(b) is merely declaratory of the long-established and inherent discretionary power of a district court to dismiss an action which plaintiff fails, at any stage, to prosecute with diligence (see *Boling v. United States*, 231 F. 2d 926, 927 (9th Cir. 1956) is clear not only from the words of the Rule but also from its history.

A preliminary draft of the Federal Rules of Civil Procedure made provision, in a rule then numbered 48, for dismissals without prejudice in various circumstances.[3] One subsection of this rule authorized dismissal, in the court's discretion, "when the plaintiff fails to appear on the trial" (proposed Rule 48(e)). A separate subsection provided for dismissal (proposed Rule 48(g)):

> "By the court in its discretion, when the plaintiff *failed to prosecute* the action with reasonable diligence, or has failed to comply with these rules or with any order of the court;" (Emphasis supplied.)

Thus, the draftsmen recognized "failure to prosecute" as embracing more than mere "failure to appear on the trial." Subsection (e) (failure to appear at trial) was later deleted, while subsection (g) (failure to prosecute) was in substance retained in the rule which was ultimately adopted as Rule 41. Obviously, the special provision concerning failure to appear at trial was deleted because such failure was necessarily comprehended within the broader provision of subsection (g) covering failure to prosecute at any stage.

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3. *Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia prepared by the Advisory Committee on Rules For Civil Procedure*, May, 1936, pp. 85-87.

That the failure to prosecute provisions of Rule 41(b) were intended to cover delay at any stage (not merely failure to appear at trial) is further demonstrated by the Advisory Committee's comments which immediately preceded adoption of the rules. With reference to Rule 3, the committee said:[6]

> "This rule provides that the first step in an action is the filing of the complaint. Under Rule 4, this is to be followed by issuance and service of process. No time limit is fixed for the issuance or service of process. *Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in taking further steps after it has been commenced.*" (Emphasis added.)

When dealing specifically with the problem of want of prosecution, no courts have interpreted Rule 41(b) in the manner suggested by petitioner. Instead they have held that plaintiff's inactivity is the only criterion for application of the Rule. Thus, in *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956), which was dismissed under 41(b) because for four years plaintiff failed to mail a copy of the summons and complaint to the Attorney General,[7] the court referred to the fact that, "For some six years there has been a complete lack of any prosecutory effort" (231 F. 2d at 330). In *Salmon v. City of Stuart, Fla.*, 194 F. 2d 1004 (5th Cir. 1952), which was dismissed under Rule 41(b) when plaintiff failed to file an amended complaint, the court stated (194 F. 2d at 1004):

> ". . . it stands undisputed that, following the filing of this, the third suit, no action was taken in it by the plaintiffs for one year and three months.

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6. Notes of Advisory Committee on Rules, Rule 3, 28 U. S. C. (1952 ed.) p. 4292.

7. See also *Waterman v. Nelson*, 195 F. 2d 523 (2d Cir. 1952), *cert. den.*, 344 U. S. 843 (1952).

"Matters standing thus, the court was fully authorized to dismiss the action."

Against this background, petitioner cites the passing comment of this Court (and the District Court for the Southern District of New York[8]) that Rule 41(b) "appears in that part of the Rules concerned with *trials*" (*Societe Internationale v. Rogers*, 357 U. S. 197, 207 (1958)) as authority for petitioner's attempt to cripple a district court's power to remove deadwood from its dockets and to prevent law suits from hanging over the heads of defendants for long periods of time.[9]

The *Societe* case has nothing to do with the portion of Rule 41(b) dealing with failure to prosecute. In *Societe* an order was entered under Fed. R. Civ. Proc. 34 requiring plaintiff to produce a vast number of documents. Plaintiff produced over 190,000 documents, but was still unable to comply with the order. Accordingly, the District Court dismissed the complaint under Rule 37(b)(2)(iii), which deals with a "refusal to obey" an order entered under Rule 34. The Court of Appeals affirmed the dismissal on the basis of the District Court's inherent power and the portion of Rule 41(b) dealing with "failure of the plaintiff . . . to comply with . . . any order of court." This Court reversed, holding that a District Court's power to dismiss for noncompliance with a discovery order rests exclusively upon Rule 37, which deals specifically with refusal to make discovery. In declining to resort to Rule 41(b) this Court commented that that Rule "appears in that part of the Rules concerned with *trials* . . . and lacks . . . specific references to discovery" (375 U. S. at 207). Here, however, we are concerned with "failure to prosecute"—plaintiff's failure to take any steps to bring this case on for trial. This subject is dealt with, specifically and exclusively, in Rule 41(b). Clearly, this Court's pass-

8. *Russo v. Sofia Bros.*, 2 F. R. D. 80, 82 (S. D. N. Y. 1941) and *Adams v. Jarka Corp.*, 8 F. R. D. 571, 574 (S. D. N. Y. 1948).

9. See *Russell v. Cunningham*, 233 F. 2d 806, 810 (9th Cir. 1956).

ing comment to the effect that Rule 41(b) was irrelevant to a discovery question was not intended to suggest that the Rule is not applicable to a "failure to prosecute" such as is involved in this case.

As pointed out by the court below (R. 42a), there simply is no more logical and appropriate place for Rule 41(b) than in the chapter marked "Trials". In fact, that chapter contains several other rules which have much less to do with trials than does Rule 41(b). For example, Rule 41(a)(1)(i) provides for voluntary dismissal at any time before service of an answer and Rule 45(d) deals with the issuance of subpoenas for taking and the place of taking depositions. Since the provision concerning failure to prosecute applies to every stage of an action (including the failure to bring a case on for trial) the only alternatives to placing it in the "Trial" chapter would be to place the rule in every chapter or to make it a chapter by itself.

With regard to the Southern District of New York cases cited by petitioner, not one involved a dismissal under 41(b) for failure to prosecute. Instead each of those cases was dismissed pursuant to some other local or procedural rule and [illegible]ly question was whether, in subsequent proceedings [illegible]lismissal should be treated as having been "with [illegible] judice" through application of the concluding portion of Rule 41(b), where it is provided that "any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." *Russo v. Sofia Bros.*, 2 F. R. D. 80 (S. D. N. Y. 1941); *Adams v. Jarka Corp.*, 8 F. R. D. 571 (S. D. N. Y. 1948); and *United States v. Thomson*, 114 F. Supp. 874 (S. D. N. Y. 1953).

In fact, the District Court for the Southern District of New York has consistently followed the decisions of its appellate court in *Waterman v. Nelson*, 195 F. 2d 523 (2d Cir. 1952), *cert. den.*, 344 U. S. 843 (1952) and *Messenger*

v. United States, 231 F. 2d 328 (2d Cir. 1956), affirming dismissals, under the authority of Rule 41(b), at an early stage of the proceedings. Thus, in *Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc.*, 20 F. R. D. 375 (S. D. N. Y. 1957), which involved dismissal of an action where plaintiff failed to substitute new counsel and failed to take steps to bring the case on for trial, the District Court stated, 20 F. R. D. at 376:

> "The power of the Court to dismiss a case for lack of prosecution probably derives from the inherent power of a court to control its calendars. *Zielinski v. United States*, 2 Cir. 1941, 120 F. 2d 792. The power is also specifically granted in Rule 41(b) of the Federal Rules of Civil Procedure." [10]

III. There Is No Conflict Between the Due Process Clause and Rule 41(b) as It Was Applied in This Case.

Finally, there is no substance to petitioner's contention that Rule 41(b) and its application to this case are somehow violative of the due process of law requirement of the Fifth Amendment. Petitioner again cites passages from this Court's decision in *Societe* where it was recognized that Fifth Amendment problems may be raised by dismissal of an action "without affording a party the opportunity for a hearing on the merits" (357 U. S. at 209). But petitioner studiously ignores the fact that for over five years it was afforded ample opportunity to obtain a trial on the merits, through the simple expedient of filing a one-sentence trial order, and it failed to accept the opportunity. Petitioner further ignores the fact that it was given a full opportunity, in both the District and the Cir-

10. In *Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 21 F. R. D. 351 (S. D. N. Y. 1958), the same Judge of the same Court dismissed an action with similar facts. On appeal, the Court of Appeals reversed, 262 F. 2d 856 (2d Cir. 1959), not on the ground that the District Court lacked the power to dismiss under Rule 41(b) before the trial stage, but on the ground that under the circumstances of that case dismissal was not justified.

cuit Courts, to explain its inactivity and the dismissal was ordered only after its failure to produce any satisfactory explanation.

Careful research fails to disclose any case which so much as suggests that, under such circumstances, the discretionary power of dismissal is in any way inhibited by the due process clause. Cf. *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948). In fact, this Court's decision in *Societe* looks the other way since it recognizes that, in the absence of good faith efforts to comply with the discovery order, the involved dismissal would have been appropriate (357 U. S. at 212, 213).

Since there is no conflict among the circuits and since the constitutional questions raised by petitioner are without substance, what petitioner really seeks is to have still a third court pass on the question of whether the discretionary power to dismiss was appropriately exercised on the facts of this case. That essentially factual question has already been carefully considered in both courts below and does not merit further consideration by this Court under its certiorari jurisdiction. Accordingly, respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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